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Report on the 4th UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency, 2001

Note by the Secretariat

1. This note contains a report of the discussion and conclusions reached at the 4th Multinational Judicial Colloquium on Cross-Border Insolvency held on 16 and 17 July 2001 in London by the Secretariat of the United Nations Commission on International Trade Law and INSOL (the International Federation of Insolvency Professionals).

2. Over 60 judges and Government officials attended from 29 States, representing a broad range of practical experience and perspectives from diverse legal systems. The Colloquium considered the progress of adoption of the Model Law and application of the legislation enacting the Model Law to cross-border issues, as well as draft Guidelines for Judicial Cooperation and aspects of judicial training and education. It provided an opportunity for judges to have contact with each other and to further their understanding of the various national approaches to cross-border insolvency cases, including current legislative action.

Adoption of the Model Law

3. The Colloquium heard a report on the progress of adoption of the Model Law and a summary of the enacting legislation, highlighting the different approaches that had been taken to particular provisions. A hypothetical cross-border insolvency case was examined and the solutions offered by the different enacting laws were considered.

* Document submitted late to allow for final comments from participants.

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4. One concern was that while the Model Law as such provided a degree of flexibility to enacting States in framing their legislation, approaching the text as if it were a menu from which to choose provisions could result in significant differences in enacting legislation. It was suggested that that result had the potential to lead to confusion if those involved in cross-border cases relied on the fact of adoption of the Model Law, rather than considering the specific provisions of enacting laws.

5. Notwithstanding the differences in enacting legislation, consideration of a hypothetical cross-border insolvency case showed the potential complexity of cross-border cases and provided a practical illustration of how adoption of the Model Law could facilitate the conduct of those cases. It was observed that with enactment of the Model Law, the different legal traditions of common law and civil law countries could be brought closer together on cross-border issues by establishing the clear, precise legislative framework needed to facilitate the conduct of cases with cross-border elements. However, it was noted that it was often difficult to retain the language of the Model Law as custom and culture played a role in the development of legislation and changes were often required to tailor the law to meet local needs.

6. It was noted that some countries had included provision for reciprocity to govern recognition of foreign proceedings and foreign representatives. Some concern was expressed that that approach had the potential not only to create a lack of clarity as to how the Model Law might be applied, but also to defeat the universality of the Model Law. In addition, it was noted that a policy of providing recognition and assistance only on a reciprocal basis had the potential to prevent a country which adopted that policy from freely offering assistance and providing recognition on the basis of what would serve its best interests and those of its creditors and debtors.

7. It was observed that current work being undertaken by UNCITRAL and INSOL on effective and efficient insolvency regimes would also facilitate the handling of issues in the cross-border insolvency context.

Facilitating judicial cooperation

8. There was a general recognition among participants that the number of cross-border insolvency cases was increasing around the world and that judges would increasingly have to assume that they could be involved in insolvency proceedings with cross-border elements. It was suggested that that possibility underlined the necessity of fostering cross-border judicial communication and cooperation to generally increase the efficiency, effectiveness and fairness of all kinds of insolvency proceedings. That need was generally supported. Specific goals of cooperation might include gathering information about liabilities and assets located in foreign countries; preventing dissipation of assets; preventing fraudulent conduct by the debtor, creditors and third parties; maximizing the value of assets; allowing the access and recognition of foreign creditors; facilitating the administration of cross-border insolvency proceedings; and finding the best solutions for the reorganization of an insolvent enterprise.

9. Participants observed that a number of typical issues needed to be addressed in order to facilitate the achievement of those goals. These included issues of culture,

language and legal traditions; the absence of a uniform legislative framework for judicial cooperation and direct communication among judges in cross-border insolvency cases; judges' lack of experience and familiarity with direct oral communication with their judicial colleagues and with insolvency practitioners in foreign countries and their lack of confidence in embarking upon that communication; ethical questions, such as how to preserve equality among the parties and the transparency of the process; and the need to change national legal rules to facilitate and to encourage judicial cooperation and communication. Another difficulty identified was that of becoming familiar with the insolvency laws of other countries, especially where close cooperation with a particular country was urgently required.

10. A further issue touched upon was that of the territoriality of insolvency. It was noted that while some countries recognized the worldwide effects of an insolvency order, others might be reluctant to give effect to a foreign order to insulate local assets and minimnize the impact of foreign proceedings. It was observed that such "ringfencing" had the potential to undermine the confidence of foreign investors and was contrary to the idea of the "rule of law" in international trade relations.

11. It was suggested that the means of addressing some of the issues were readily available. In terms of the legislative framework, the UNCITRAL Model Law on Cross-Border Insolvency could be adopted as a simple, and at the same time highly effective, means of establishing the basic principles needed. It was observed that the process of fostering cooperation could be incremental, with the Model Law establishing the first step. It was noted that in some jurisdictions a further degree of cooperation was tentatively developing with the courts taking the step, in giving assistance to a foreign insolvency court, of making orders that neither the domestic court nor the foreign court could have made in a domestic situation.

12. To address other issues it was noted that there was the possibility of developing guidelines for judicial cooperation to facilitate a common approach (see below). In the technical field, advances in communication technology provided new ways in which communication could be achieved. In terms of the availability of information on legislation, it was noted that a number of different resources, including databases available on the internet, were being developed to facilitate dissemination of that information, including global and local initiatives in both the private and public sectors. It was generally agreed that it was important to foster relationships between judges and between judges and insolvency professionals through meetings such as the UNCITRAL/INSOL colloquia to enable judges to meet, to exchange ideas and experiences, to learn about the difficulties faced and to share their concerns. It was suggested that those meetings should continue, and be increased and complemented perhaps with regional forums, as well as the development of permanent avenues for discussion and virtual forums.

Guidelines for judicial cooperation

13. The Colloquium considered a draft of guidelines for judicial cooperation and communication.[1] While a number of concerns were raised with regard to the level of

[1] The draft Guidelines acknowledged the work initiated in the NAFTA region by the American Law Institute.

detail contained in the draft provisions and a number of procedural issues, there was a general view that such guidelines would be useful to foster a common approach to issues of cooperation and, in particular, communication. In that regard, it was noted that a degree of confusion existed between the different levels at which communication might be required. Court to court communications involved discussions between the judges in very general terms on issues such as objectives, agendas and the scheduling of hearings. It was noted that that form of communication required the prior agreement of the parties to ensure transparency, as well as the availability of transcripts and the maintenance of proper records to avoid future disputes. Communication with insolvency professionals, however, raised different issues such as the need for the court at all times to maintain its impartiality and independence, whether from the parties or the insolvency practitioner who represented the debtor.

14. It was also recognized that emergency procedures were often required to facilitate quick action, even without the presence of all parties. It was noted that some countries allowed a party to make an application for emergency orders in the absence of any other competing parties. Those procedures were subject to rules to protect the position of the absent parties and the orders made were generally for a limited duration until the other parties had the opportunity to present to the court their views on the application.

Judicial training

15. There was a general recognition among participants of a need for judicial education and training (including on a continuing basis) to ensure proper and efficient functioning not only of the regime for cross-border cases, but also for insolvency laws in general. It was suggested that training and education programmes should be based upon an assessment of needs that would enable the programmes and their delivery to be tailored to the requirements (legal, social and cultural) of the local jurisdiction and be compatible with its budget, the caseload demands of judges and the availability of international assistance, including both financial and human resources.

16. Participants noted that training and education programmes also needed to take into account the specific role that a judge played in insolvency matters in a particular jurisdiction, recognising that most countries did not have specialised bankruptcy courts and that in some jurisdictions the judicial role was more one of supervising the reorganization process. In those jurisdictions, judicial involvement might be restricted to resolving disputes, whereas in others judges might be required to take a more pro-active role in the insolvency process.

17. It was noted that education and training could be delivered in a number of different ways including through programmes involving direct contact between educators and judges; use of technology such as two-way video conferencing; and delivery systems which have an extended shelf life capable of repeated access by judges such as videos, CD-ROMs and the internet. It was suggested that international organizations have a role to play in fostering contacts between insolvency professionals and providing access to resources such as best practice principles and insolvency legislation in different languages to facilitate access and use.

18. A further observation was that training and education should be coordinated between the judiciary and insolvency practitioners and counsel who appear in insolvency matters, with no restriction on which parties could give and receive training. For example, it was desirable that there would be no restrictions on judges training judges; judges assisting in the training of practitioners and practitioners assisting in the training of judges.

Conclusions

19. Discussion at the Colloquium reflected a number of conclusions, including: (a) a consensus view that the UNCITRAL Model Law on Cross-Border Insolvency should be widely promoted and adopted, with as few changes as possible to ensure a basic, effective and uniform framework for the conduct of cross-border insolvency cases; (b) the need to facilitate judicial cooperation and communication, through the dissemination of information on insolvency law and legislation, development of guidelines on judicial communication and the provision of continuing opportunities for judges, particularly those from developinbg countries, to meet and share their experiences in multi-national forums, such as the UNCITRAL/INSOL colloquia; and (c) the need for judicial training and education programmes to ensure the efficient and effective conduct of cross-border, as well as domestic, insolvency cases. It was noted that many countries had indicated their willingness to provide experienced judges and insolvency professionals to assist with training and education and that a number of international professional organizations, such as INSOL and the IBA, were already actively involved in programs delivering training and assistance. It was also noted that the UNCITRAL Trust Fund for Technical Assistance could have a role to play in providing training and assistance.